No. 20,094

United States Court of Appeals

For the Ninth Circuit

EASTLAND CONSTRUCTION CO., INC.,
Appellant,

vs.

KEASBEY AND MATTISON COMPANY,
Appellee.

BRIEF FOR APPELLANT

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I

JURISDICTION

This appeal arises out of the case captioned Eastland Construction Co., Inc., Plaintiff, v. Johns-Manville Corp., and Keasbey and Mattison Company, Defendants, No. 43012, filed in the United States District Court for the Northern District of California (San Francisco) on November 18, 1964. The single count complaint [R. pp. 1-9] charged that defendants had engaged in a combination and conspiracy to restrain interstate and foreign trade and commerce in the production and sale of asbestos-cement pipe and couplings in violation of Section 1 of the Sherman Act, and further, that the defendants have combined and conspired to monopolize the same trade and commerce in asbestos-cement pipe and couplings in violation of Section 2 of the Sherman Act and further, that each defend-

ant, acting unilaterally, had attempted to monopolize the aforesaid trade and commerce in violation of Section 2 of the Sherman Act. Plaintiff alleged that, as a result of these violations of the antitrust laws, it was "overcharged" for asbestos-cement pipe produced by defendants. Jurisdiction of the District Court rests on Section 4 of the Clayton Act (15 U.S.C. 15).

On February 11, 1965, defendant Keasbey and Mattison Company (hereinafter K&M) moved, *inter alia,* to dismiss the complaint because of improper venue. That motion rested on the ground that K&M was not at the time this action was filed, or at the time of the purported service of summons, an inhabitant of, found in, or transacting business in the Northern District of California. [R. pp. 10-11]

On March 17, 1965, the District Court entered its order which recited that:

> "Counsel for plaintiff having conceded that as of June 1, 1962 the defendant Keasbey and Mattison Company ceased to do business in California and has not done any business in this state since, the Court finds that at the time of the filing of the instant complaint (November 18, 1964) and for two years, five months and eighteen days this district was not a district wherein said corporation may be found or 'transacts business'. This Court is therefore without proper venue as to this corporation and by reason thereof, IT IS ORDERED that the complaint herein is dismissed as to defendant Keasbey and Mattison Company." [R. p. 149]

On April 2, 1965, the Court entered its final judgment dismissing the complaint as to K&M. The judgment re-

cited "there is no just reason for delay and having expressly directed the entry of judgment herein . . ." [R. p. 154]

This Court has jurisdiction of this appeal under the provisions of 28 U.S.C. 1291. See also Rule 54(c) of the Federal Rules of Civil Procedure, as amended; *Sigmund v. General Commodities Ltd.,* 175 F. 2d 952 (9th Cir. 1949); *Republic of China v. American Express Co.,* 190 F.2d 334 (2nd Cir. 1951); *Youpe v. Moses,* 213 F.2d 613 (D.C. 1954); *Seaboard Surety Co. v. Westwood Lake, Inc.,* 277 F.2d 397 (5th Cir. 1960).

II

STATUTES INVOLVED

15 U.S.C. 15 provides, in pertinent part:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover three-fold damages by him sustained . . ."

15 U.S.C. 16(b) provides in pertinent part:

"Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, . . . the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter . . ."

15 U.S.C. 22 provides:

> "That any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any judicial district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found."

III

STATEMENT OF THE CASE

The facts upon which this appeal is based are quite simple. On June 1, 1962, a federal grand jury sitting in the Eastern District of Pennsylvania returned an indictment charging K&M, among others, in two counts, with violations of the antitrust laws. That indictment [R. pp. 41-51], filed on June 1, 1962, became criminal case No. 21118 in the United States District Court for the Eastern District of Pennsylvania (hereinafter referred to as the Government case).[1] The allegations of the complaint in the action below are substantially identical with and are predicated upon the indictment in the Government case and the facts elicited during the trial thereof.

On June 1, 1962, the same day upon which the indictment was returned, K&M, pursuant to a written agreement, sold all, or substantially all, of its asbestos-cement

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[1]After a jury trial of about 4½ months, each defendant was acquitted on all charges; as to some defendants and charges the Court granted a motion for judgment of acquittal; as to the remaining charges and defendants, the jury returned a "not guilty" verdict. A companion civil case is now pending.

pipe and coupling business, including its plants, equipment, accounts, records, trade names, patent rights and other assets employed by K&M in connection with the manufacture, sale and distribution of asbestos-cement pipe and couplings. [R. p. 60] Included in the foregoing sale was an asbestos-cement pipe producing plant owned by K&M and located in Santa Clara, California—a location within the judicial district of the Court below. [R. p. 98]

Subsequent to the sale (the exact date not appearing in the record below), defendant K&M withdrew its certificate of transacting business in California. By November 18, 1964, the date on which the complaint in this case was filed, K&M had instituted proceedings, in accordance with the law of Pennsylvania, the State of its incorporation, to dissolve, and was awaiting a final tax clearance from Pennsylvania upon receipt of which K&M asserted that it would formally terminate its corporate existence. [R. p. 113]

At the oral argument on the motion to dismiss for lack of venue, counsel for appellant conceded in open Court that defendant K&M had not transacted business in the State of California since June 1, 1962. The Court below concluded that the period of two years, five months and eighteen days—the time between June 1, 1962 and the filing of the complaint on November 18, 1964—rendered the Court below without proper venue as to defendant K&M and that accordingly, the Northern District of California "was not a district wherein said corporation may be found or 'transact business' ". [R. p. 149] Final judgment of dismissal dated and filed April 2, 1965 was entered upon this order. [R. p. 154]

IV

QUESTION PRESENTED

The sole question presented by this appeal is whether a foreign corporation named as a defendant in a private antitrust case filed in California may immunize itself from suit in California by a cessation of its business transactions in California during a period when the running of the statute of limitations is suspended as to that defendant by reason of a prior Government proceeding.

V

SUMMARY OF ARGUMENT

By dismissing the complaint as to defendant K&M on the grounds that the Northern District of California was not the proper venue for this action, the District Court fashioned a rule which not only diametrically conflicts with the expressed intention of Congress, but which also ignores the repeated admonitions of the Supreme Court of the United States in interpreting the Congressional mandate. The bizarre result necessarily flowing from the decision below is that a defendant as to which the running of the statute of limitations is suspended may, by the sale of its assets and withdrawal to its corporate headquarters, require a plaintiff either (1) to wait for the conclusion of the Government case and then to "chase" the defendant to its headquarters office or (2) to give up the benefits of the tolling provision (15 U.S.C. 15(b)) and sue immediately so as not to lose the benefits of the venue statute (15 U.S.C. 22).

Rather than subject an antitrust plaintiff to this "Hobson's choice", the District Court, in dealing with this question should have fashioned a rule designed to further—not defeat—the Congressional policy set forth in the statutory complex governing the institution and conduct of private antitrust proceedings. Where those statutes would *appear* to conflict, a rule should be developed to accommodate the well established policy of the law which regards treble damage actions as an important component of the public interest in the vigilant enforcement of the antitrust laws. Such an accommodation would lead to a rule which recites that a foreign corporation, which has transacted business in a district in which it has allegedly inflicted injury by reason of violations of the antitrust laws, may be sued within that district even though it is no longer transacting business in the district at the time suit is brought—if the suit is instituted by the plaintiff within the period of time during which the running of the statute of limitations is suspended as to that defendant.

VI

ARGUMENT

This Court has astutely observed that:

> ". . . a niggardly construction of the treble damage provisions would do violence to the clear intent of Congress. The private antitrust action is an important and effective method of combatting unlawful or destructive business practices. A private suitor complements the Government in enforcing the antitrust laws. The treble damage provision was designed to foster and stimulate the interest of private business in main-

> taining a free and competitive economy. Its efficacy should not be weakened by judicial consideration." *(Flintkote Co. v. Lysfjord,* 246 F.2d 368, 398 (9th Cir. 1957).)

And, more recently, this Court has pointed out that "private treble damage actions are an important component of the public interest of 'vigilant enforcement of the antitrust laws' ". *Olympic Refining Co. v. Carter,* 332 F.2d 260, 264 (9th Cir. 1964), cert. denied 85 S.Ct. 186 (1964). See also *Lawlor v. National Screen Service Corp.,* 349 U.S. 322, 329, 75 S.Ct. 865 (1955); *Bruce's Juices, Inc. v. American Can Co.,* 330 U.S. 743, 751-2, 67 S.Ct. 1015 (1947).

Where a defendant has been either indicted or sued in a civil case brought by the Government for violations of the antitrust laws, Congress has decreed that the running of the statute of limitations is suspended as to "every private right of action arising under said [antitrust] laws and based in whole or in part on any matter complained of in the said [Government] proceeding . . ." (15 U.S.C. 16(b)).

In *New Jersey Wood Finishing Co. v. Minnesota Mining & Manufacturing Co.,* 216 F.Supp. 507 (New Jersey 1963), aff'd 332 F.2d 346 (3rd Cir. 1964), cert. granted 85 S.Ct. 146 (1965), the District Court said:

> "It seems clear that Congress intended by Section 5(b) 15 U.S.C. 16(b) to allow antitrust litigants an opportunity, which might otherwise be barred by the four years statute of limitations, to take advantage of facts uncovered in related Government proceedings . . . Thus, a private party which has suffered damages to its business by reason of unlawful anti-

trust activity is permitted additional time to derive the benefits of a Government investigation." (216 F. Supp. at p. 510.)

Section 5 of the Clayton Act, now 15 U.S.C. 16(b), was amended in 1955. In Senate Report 619, 84th Congress, First Session, U.S. Code Congressional and Administrative News, pp. 2328-2334, which favorably recommended the amendments, the Senate Committee on the Judiciary said:

> This bill makes several important changes in the tolling provisions of existing law. As presently written, section 5 of the Clayton Act tolls the statute of limitations with respect to private treble-damage suits during the pendency of a suit by the United States to punish or restrain violations of the antitrust laws. This period of tolling is continued by the present bill with several modifications.
>
> There are many instances where the statute of limitations as to a private cause of action may nearly have expired before suit is instituted by the Government under the antitrust laws. Although the statute is tolled during the pendency of the proceedings brought by the United States, the plaintiff in a treble-damage action may find himself hard pressed to reap the benefits of the Government suit if, upon its conclusion, he has but a short time remaining to study the Government's case, estimate his own damages, assess the strength and validity of his suit, and prepare and file his complaint. To alleviate such difficulties, the present bill would extend the tolling period not only for the duration of the Government's antitrust suit, but for 1 year thereafter. This would guarantee all plaintiffs an adequate period in which to take advantage of Government antitrust proceedings.

While the committee believes it important to safeguard the rights of plaintiffs by tolling the statute during the pendency of Government antitrust actions, it recognizes that in many instances the long duration of such proceedings taken in conjunction with a lengthy statute of limitations may tend to prolong stale claims, unduly impair efficient business operations, and overburden the calendars of courts. The committee believes the provision of this bill will tend to shorten the period over which private treble-damage actions will extend by requiring that the plaintiff bring his suit within 4 years after it accrued or within 1 year after the Government's case has been concluded.

While the committee considers it highly desirable to toll the statute of limitations during a Government antitrust action and to grant plaintiff a reasonable time thereafter in which to bring suit, it does not believe that the undue prolongation of proceedings is conducive to effective and efficient enforcement of the antitrust laws. The present bill would assure all plaintiffs of at least 4 years from the time their cause of action accrued in which to institute suit. It would also guarantee every plaintiff at least a year from the close of a Government antitrust suit to prepare his case and file his complaint. But in cases where the plaintiff's action had been suspended by the pendency of a Government antitrust proceeding, he would be required to bring his action either (a) within the suspension period, i. e., within 1 year after the Government suit had terminated, or (b) within 4 years after his cause of action accrued. (id, pp. 2332-2333).

And in enacting the original Section 5 of the Clayton Act, Congress expressed the same concern for "persons

of small means" injured by antitrust violations. The House Report on that Bill (H.R. Rep. 627, 63rd Cong. 2d Sess. p. 14) stated:

> "Section 6[2] provides that a final decree obtained by the United States in a suit to dissolve a corporation or unlawful combination may be offered in evidence in a suit brought by a private suitor for damages under the antitrust laws by reason of the unlawful acts of the defendant corporation, and that when such decree or judgment is so offered it shall be conclusive evidence of the same facts and be conclusive as to the same questions of law as between the parties in the original suit or proceeding. This section also provides that the statutes of limitations shall be suspended in favor of private litigants who have sustained damage to their property or business by the wrongful acts of the defendant during the pendency of the suit instituted by or on behalf of the United States. The entire provision is intended to help persons of small means who are injured in their property or business by combinations or corporations violating the antitrust laws.
>
> It is in keeping with a recommendation made by the President in his message to Congress on the general subject of trusts and monopolies."

Plainly, Section 5 of the Clayton Act (15 U.S.C. 16(b)) was intended to grant plaintiffs of small means the benefit of accumulating evidence from Government litigation. It thereby encouraged a prospective plaintiff to await the outcome of the Government litigation. It also gave a prospective plaintiff a year after the termination of the Gov-

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[2]Section 6 of the proposed bill became Section 5 of the Clayton Act.

ernment case to "study the Government's case, estimate his own damages, assess the strength and validity of his suit, and prepare and file his complaint". And that is precisely what appellant has done here.

But the statute also confers a concomitant benefit upon the defendant involved in Government litigation. Necessarily, by encouraging plaintiffs to await the outcome of Government litigation, the defendant finds itself free of treble damage litigation during the time its attention must be directed to defense of the Government suit. Thus, viewed in totality, the statute has the effect of granting to prospective plaintiffs and defendants alike a "stay" so that the Government litigation may be resolved.

But Section 5 of the Clayton Act (15 U.S.C. 16(b)) must be read as part of an interlacing text along with Section 12 of the Clayton Act (15 U.S.C. 22) which governs the forum in which an antitrust plaintiff may sue. It is no longer open to question that in enacting Section 12 of the Clayton Act Congress enlarged the venue provisions of the antitrust laws so that suits could be brought by a plaintiff against a defendant in the district not only where the defendant resides or was found, but also in any district where a defendant "transacts business". *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 47 S.Ct. 400 (1927).

The purpose of Congress in enlarging the venue provisions under the antitrust laws was to relieve

> "persons injured through corporate violations of the antitrust laws from the 'often insuperable obstacle' of resorting to distant forums for redress of wrongs done in the places of their business or residence. A

> foreign corporation no longer could come to a district, perpetrate there the injuries outlawed, and then by retreating or even without retreating to its headquarters, defeat or delay the retribution due." *U.S. v. Scophony Corp.,* 333 U.S. 795, 808, 68 S.Ct. 855, 862 (1948).

In *Scophony,* the Supreme Court said that it was

> "unwilling to construe Section 12 (15 U.S.C. 22) in a manner to bring back the evils it abolished . . . and thus to defeat its policy, together with that of the antitrust laws, so as to make another amendment necessary." 333 U.S. at 817, 68 S.Ct. at 866.

The Congressional intent in the enactment of Section 5 of the Clayton Act (15 U.S.C. 16(b)) and Section 12 of the Clayton Act (15 U.S.C. 22) is now well accepted. The question involved in this appeal is what result should be reached when a literal reading of the statutes would make it appear that they are in conflict.

We are unable to submit to the Court any reported decision which deals with the precise factual situation in issue here. But we respectfully submit that the conclusion reached by the court below defeats the policy of the antitrust laws and is in conflict with the intention of Congress in their enactment.

The dilemma in which this plaintiff has been placed by reason of the ruling below is as follows: On June 1, 1962 plaintiff learned (or at least is charged with knowledge) of an indictment returned against K&M charging that defendant with violations of the antitrust laws which allegedly involve and adversely affect this plaintiff. But, on June 1, 1962, the plaintiff knew nothing whatever

about the details of these alleged violations of the anti-trust laws or the facts on which the indictment was based. Recognizing the frequency of precisely such situations, Congress intended, by its enactment of Section 5 of the Clayton Act to encourage private litigants, such as this plaintiff, to await the conclusion of the Government proceedings before instituting suit. In this manner, the plaintiff would secure the benefits of the evidence as it unfolds at the trial. And the defendant secures the concomitant benefit of insuring that it will not be harassed by a multiplicity of lawsuits at the time when its attention is directed toward the defense of the Government suit. But, on the same day—June 1, 1962—K&M sells substantially all of its assets, including its plant located within this judicial district, to a third party.

Under Judge Zirpoli's ruling, plaintiff is then faced with a "Hobson's Choice". In order to sue defendant below in California at a time when it is still transacting business within the judicial district, it must, without any time in which to study the charges or await the revelation of the evidentiary facts, rush to the courthouse with a complaint. In so doing, plaintiff would lose the benefits which Congress sought to confer by Section 5 of the Clayton Act. Indeed, K&M would be losing the concomitant benefit which flows therefrom.

We respectfully submit that Congress, in the enactment of the interlacing text governing the conduct of treble damage litigation, did not intend such a bizarre result. At least two district Courts—wholly apart from the tolling statute—have held that the words "transacts business" as used in Section 12 of the Clayton Act (15 U.S.C. 22)

are not to be read literally—but are to be interpreted liberally consistent with the Congressional purpose.[3] In *Coulter Funeral Home, Inc. v. National Burial Insurance Co.*, 192 F.Supp. 522 (E.D. Tenn. 1960), the District Court, in holding a defendant to be amenable to suit within the judicial district, even though it had filed an affidavit showing that it had transacted no business within the judicial district for the past year, said:

> But in any event, the words "transact business" do not intend to mean that the defendant has to be transacting business on the day the suit is commenced. Reference is made to the case of United States v. Scophony Corp., 333 U.S. 795, 68 S.Ct. 855, 92 L.Ed. 1091, for a general discussion of this question. This case, after announcing the obvious purpose of the venue statute and its intended liberality and extension, concludes at the bottom of page 808 of 333 U.S., at page 862 of 68 S.Ct., "A foreign corporation no longer could come to a district, perpetrate there the injuries outlawed, and then by retreating or even without retreating to its headquarters defeat or delay the retribution due."
>
> This is a plain recognition that if the transaction of business, within a district, by a corporation violates the proscribed provisions charged as the basis of the suit, such corporation is amenable to suit therein despite the fact that it may have retreated. Also see Eastman Kodak Co. of New York v. Southern Photo Materials Co., 273 U.S. 359, 47 S.Ct. 400,

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[3]This Court has also acknowledged the "broad concepts and objectives of 15 U.S.C.A. 22". See *Courtesy Chevrolet, Inc. v. Tennessee Walking Horse Breeders' and Exhibitors' Assn. of America*, ... F.2d ..... (1965), 1965 Trade Cases, ¶ 71,443, May 3, 1965.

71 L.Ed. 684 and United States v. Nat. City Lines, 334 U.S. 573, 68 S.Ct. 1169, 92 L.Ed. 1584. (192 F. Supp. at 523).

And in *Ross-Bart Port Theatre v. Eagle Lion Films,* 140 F.Supp. 401 (E.D. Va. 1954), the court reached precisely the same conclusion despite the fact that the defendant was absent from the forum for a full five years preceding the institution of the litigation.

If a defendant as to whom the running of the statute of limitations is suspended may, by selling its assets to a third party during the period of suspension, require each prospective plaintiff to resort to a distant forum, then the enlargement of the venue provisions granted by Congress in Section 12 of the Clayton Act (15 U.S.C. 22) is a virtual nullity. The ruling of the court below plainly ignores the direction of the Supreme Court that, in enacting Section 12 of the Clayton Act Congress intended to relieve persons injured by corporate violations of the antitrust laws from the "often insuperable obstacle" of chasing a retreating defendant to its headquarters in order to maintain the action. Plainly, the decision of the District Court here permits the classical "retreat" contemplated by the Supreme Court in *Scophony.*

15 U.S.C. 16(b) and 15 U.S.C. 22 must be read as an harmonious and interlacing context. Congress could not have, on the one hand, intended to encourage plaintiffs injured by the antitrust laws to await the outcome of prior Government litigation and, on the other hand, intended to *penalize* such plaintiffs for waiting by forfeiture of the broad venue provisions. If the tolling provision is to have any clear and consistent meaning, it

must be to preserve the status quo as of the time the Government instituted its proceeding. This would require that a defendant as to whom the statute of limitations is suspended by reason of a Government proceeding, be amenable to suit in any district in which it "transacts business" *as of the date on which the Government proceeding was instituted.*[4]

In this case, the controlling date is June 1, 1962 and on this date the defendant K&M was transacting business in this judicial district. K&M should not, by sale of its assets be permitted to "retreat to its headquarters" and thereby subject this plaintiff to the "insuperable obstacle" of requiring that it sue in Pennsylvania—and not in California where the alleged injuries were inflicted.

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[4]Even this rule may not be sufficiently liberal to accomplish the objectives sought by Congress. Suppose a corporation which has transacted business in California actually dissolves shortly before an indictment against it is returned. Because California law permits suits against dissolved corporations, the indictment does not abate as against the now defunct entity. *Melrose Distillers Inc. v. U. S.,* 359 U.S. 271 (1959). In these circumstances, it would seem harsh to permit the Government to sue in California and, at the same time, to deny a California plaintiff access to California courts. Thus, the better rule would seem to be that a defendant should be amenable to suit in any district in which it has transacted business during any part of the period for which damages can be recovered. And this rule is really then not contingent upon a prior Government suit. However, it is unnecessary to reach this more difficult question on the facts of this case.

VII

CONCLUSION

The decision of the District Court is erroneous. It conflicts with the clear intention of Congress and with the decisions of the Supreme Court. Accordingly, the judgment below should be reversed and the complaint reinstated as to defendant K&M.

Dated, San Francisco, California,
May 18, 1965.

Respectfully submitted,
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Certificate of Counsel

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Maxwell M. Blecher,
Attorney for Appellant.